IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-6767

FRANK RICARDO SCOTT
and
BERNIS LEE THURMON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF OF PETITIONERS

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INTRODUCTORY STATEMENT

The Court, on October 11, 1977, granted a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the judgment of that court affirming petitioners' convictions and its two interlocutory decisions reversing district court orders

suppressing wiretap evidence for failure to minimize interception of non crime-related conversations in violation of 18 U.S.C. §2518(5).

The first suppression opinion is at 331 F. Supp. 233 (D.D.C. 1971), and the Court of Appeals' first remand opinion ("Scott I") is at 164 U.S. App. D.C. 125, 504 F.2nd 194 (1974). The second suppression order is not reported, and the Court of Appeals' second reversal opinion ("Scott II") is at 170 U.S. App. D.C. 158, 516 F.2nd 751 (1975). The Court of Appeals' third opinion, affirming the convictions, is not reported.

This Court has jurisdiction to review the judgment below by writ of certiorari under 28 U.S.C. §1254(1). The judgment was entered March 29, 1977, and, upon application, the time for petitioning for a writ of certiorari was extended to May 28, 1977. The petition was filed May 19, 1977.

STATUTES INVOLVED

18 U.S.C. §2510

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

18 U.S.C. §2518

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but

only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that–

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion.

If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

QUESTIONS PRESENTED

I. When narcotics agents executing judicial wiretap orders requiring them, under 18 U.S.C. §2518(5), to minimize the interception of non crime-related conversations admittedly made no good faith try at minimization and instead intercepted every conversation in whole despite their own conclusion that sixty (60) per cent of the conversations were non crime-related, may a court, consistent with the deterrent basis of Title III of the Safe Streets Act of 1968 and the exclusionary rule, sustain the execution of the wiretaps by accepting the after the fact analysis of the wiretap transcripts prepared by an Assistant United States Attorney which abandoned the categories used by the executing narcotics agents and justified interception of telephone calls on the ground that agents could have found it not feasible to exclude those calls from interception.

II. Whether 18 U.S.C. §2518(10)(a) and the Fourth Amendment exclusionary rule require suppression of all intercepted conversations when narcotics agents executing wiretap orders violate the minimization order

required by 18 U.S.C. §2518(5) by failing, in bad faith, to even attempt minimization of non crime-related conversations.

III. Whether Petitioner Scott, an "aggrieved person" under 18 U.S.C. §2510(11), who was not heard in any non crime-related conversations, has "standing" to insist on suppression of all conversations intercepted by a wiretap operation violating the minimization provisions of 18 U.S.C. §2518(5) on the ground that "the communication was unlawfully intercepted" and "the interception was not made in confirmity with the order of authorization . . ." as provided in 18 U.S.C. §2518(10)(a)(i) and (iii).

PROCEDURAL HISTORY OF THE CASE

On January 24, 1970, District Judge Smith authorized narcotics agents to wiretap a telephone in accordance with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2518 (1970). The authorization contained an order to conduct the intercept "in such a way as to minimize the interception of communications that are not otherwise subject to interception." (App. 80).[1] Wiretap information led to the arrest of Petitioners Frank Ricardo Scott, ("Scott"), Bernis Lee Thurmon, ("Thurmon") and others for narcotics laws violations on February 24, 1970. Two multi-count indictments filed on June 24, 1970[2] charged, Scott, Thurmon and others with narcotics laws violations.

[1] References to the Joint Appendix will be made as (App. ____).

[2] The two indictments were consolidated in 1971.

Scott, Thurmon and others moved to suppress the wiretap evidence on numerous grounds, and hearings were held between April 12 and April 21, 1971. On April 29, 1971, District Judge Waddy suppressed all wiretap evidence for failure to minimize interception of non crime-related calls in violation of 18 U.S.C. §2518(5). 331 F. Supp. 223 (D.D.C. 1971) (App. 1). The Government moved on May 26, 1971 for reconsideration of the suppression order on the basis of a newly prepared "call analysis," but on June 25, 1971 Judge Waddy adhered to his order.

The Court of Appeals vacated Judge Waddy's suppression order on June 27, 1974, and remanded with instructions to consider additional evidence and the "call analysis" in light of the minimization standards for testing it announced in *United States v. James*, 161 U.S. App. D.C. 88, 494 F.2d 1007, cert. denied 419 U.S. 1020 (1974). 164 U.S. App. D.C. 125, 504 F.2d 194 (D.C. Cir. 1974) ("Scott I") (App. [redacted]). On remand, Judge Waddy held hearings from October 15 to October 18, 1974 and filed unpublished findings of fact and conclusions of law on November 12, 1974 again suppressing the wiretap evidence (App. [redacted]). On July 25, 1975, the Court of Appeals again reversed the suppression order and remanded for trial. 170 U.S. App. D.C. 158, 516 F.2d 751 (1975) ("Scott II") (App. [redacted]). The Court of Appeals denied rehearing *en banc*. (App. [redacted]). This Court denied certiorari to review the *Scott II* decision, 425 U.S. 917 (1976), with Mr. Justice Brennan, Mr. Justice Marshall, and Mr. Justice Powell dissenting. (App. [redacted]).

After the denial, the case returned to the district court and went to trial after speedy trial motions were

denied. Following a non-jury trial on stipulated facts, Judge Waddy found Scott guilty of the sale or purchase of narcotics not in the original stamped package in violation of 26 U.S.C. 4704(a) and Thurmon guilty of conspiracy to sell narcotics in violation of 26 U.S.C. 7237(b) and 4705(a),[3] sentencing both to ten years imprisonment. The Court of Appeals opinion of March 29, 1977 affirming the convictions is unreported. This Court granted certiorari on October 11, 1977.

STATEMENT OF THE CASE

A. Wiretap Procedure

1. Applications

On the basis of information obtained from informants and prior investigation, the Government applied on January 24, 1970 to District Judge Smith for an order to wiretap telephone number 4[redacted]-2948, registered to Geneva Thornton[4] and located in a residence at 1425 N Street, #603, Northwest, Washington, D.C. The Government alleged probable cause to believe that Thurmon, Alphonso H. Lee ("Lee"), and others were committing narcotics offenses and using telephone number 483-2948 in connection with such

[3] The statutes under which Petitioners were convicted were repealed in connection with the enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1292, 21 U.S.C. §840 (1970).

[4] Also known as Geneva Jenkins, girlfriend of Thurmon, who lived at the same address.

offenses. The affidavit of special agent Glennon L. Cooper ("Cooper"), in support of the wiretap application listed the primary suspects of the investigation, including Scott and Thurmon. (App. [redacted]) Cooper claimed the wiretap would reveal "the details of a scheme used to smuggle narcotics into the United States, transport such narcotics into the Washington, D.C. area and distribute them in [that] area." (App. [redacted]) Although Cooper claimed Thurmon was a local drug trafficker (App. [redacted]), the initial twenty day wiretap was sought on his telephone (registered to Geneva Thornton) because Lee, claimed to bring drugs into the Washington area, was hospitalized and had temporarily shifted his business calls to the 483-2948 number. (App. [redacted]).

2. Orders

Based on Cooper's affidavit and the supporting affidavit of Assistant United States Attorney Sullivan ("Sullivan"), on January 24, 1970 Judge Smith authorized a wiretap of the Thurmon telephone for twenty days,[5] with the provision required by 18 U.S.C. §2518(5) (1970), that the interception "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter." (App. [redacted]). He required progress reports every five days. (Ibid.)

[5] Application was made for 20 days. A typographical error resulted in the authorization of a 30-day intercept, but the Government applied for an extension after 20 days.

After Lee was released from the hospital, the Government applied to Judge Smith February 4, 1970 for permission to tap Lee's two telephones at 5195 Linnean Terrace, Northwest, Washington, D.C. (App. 84) On February 4, 1970, Judge Smith authorized wiretap of the two Lee telephones, again requiring minimization of the interception of non crime-related conversations and five day progress reports.

On February 13, 1970 the Thurmon wiretap was extended. (App. [redacted])

3. Reports

The Government submitted five day reports designed to detail the nature of the communications intercepted, demonstrate what progress had been made toward achievement of the authorized objective and the need for continued interception. For the most part, the reports simply reveal the number of calls intercepted during delineated time spans and state which of those calls were considered narcotics related.[6] The reports did not, however, reveal the monitoring agents' assessment that 60% of the calls were not narcotics related, that all calls were listened to, and that no efforts were made to

[6] A few reports summarize segments of taped conversations revealing interstate connections and other matters pertinent to identification and verification of the various conspirators. E.g., February 8 report, February 13 report. The incompleteness and inaccuries of the reports and their effect on the minimization issue before the district court will be discussed in the argument, *infra*.

exclude or develop categories to exclude non-pertinent calls.

The Thurmon and Lee wiretaps continued until February 24, 1970, when Thurmon and Scott were arrested.

B. Proceedings After Indictment

1. Pre-Trial Motions To Suppress

Judge Waddy held hearings in April, 1971 ("the 1971 hearings") on several pre-trial motions, including one to suppress all wiretap evidence on the ground that the monitoring agents failed to minimize the wiretap intrusions. On April 29, 1971, he granted the motion to suppress for lack of minimization, stating that the agents in charge of the interceptions "did not even attempt 'lip service compliance' with the provision of the order and statutory mandate, but rather completely disregarded it." (App. 21) Judge Waddy found that the monitoring agents clearly understood the wiretap orders' requirement of minimization. (App. 20) Judge Waddy based his findings upon the testimony of Cooper, the agent in charge of the Thurmon wiretap operation, who was the sole witness on the minimization issue at the April hearings. Cooper testified that he understood Judge Smith's order "to restrict [the intercept] to conversations relating to narcotics" and so instructed the agents manning the intercept.[7]

[7]Cooper stated that the agents were specifically instructed to monitor "all calls except for those which [fall] into a privileged nature, certain restricted types of calls," (1971 Tr. 308).

Judge Waddy found that virtually all conversations were recorded and approximately 60% were completely unrelated to narcotics. Ibid. Moreover, he examined specific instances where the intercept should have been cut off, citing calls between Geneva Jenkins and her mother as one example.[8] Judge Waddy's findings relied on Cooper's admission that, although none of the cited conversations appeared narcotics related, there was no attempt to cut off interception. (1971 tr. 350-53). Judge Waddy rejected the Government's reliance on the reports to Judge Smith, finding that they did not reveal the agents were failing to minimize and, in fact, were listening to and recording in full all conversations. (App. 22). Finally, Judge Waddy noted that "[t]he record is devoid of any attempt, no matter how slight, to minimize the interception of unauthorized calls." (App. 23) Judge Waddy relied particularly on Cooper's testimony that no exercise of discretion by any monitoring agent ever resulted in non-recordation.[9]

[8]Judge Waddy cited other calls, such as a Thurmon call to the bank and a call to the weather bureau, as among those where the intercept clearly should have been cut off. (App. 24).

[9]Cooper stated that "it was up to the agent to listen to the conversation and determine what type of conversation it was," (1971 Tr. 318), and that he "made phone calls to Mr. Sullivan relating to pertinent information which had been revealed as a result of the intercept." (1971 Tr. 30). He further testified that no call was ever made to Sullivan to limit the discretion of any agent during the surveillance. (1971 Tr. 321). The tap was cut off on one occasion but only because a malfunction had caused the intercept to be placed on the wrong telephone line. (1971 Tr. 321; 1974 Tr. 681).

2. Motion For Reconsideration

On May 25, 1971 the Government moved for reconsideration on a legal memorandum prepared by Assistant United States Attorney Kellogg ("Kellogg") which contended that "the peculiar characteristics" of the conspiracy required that "nearly all calls" be recorded. (Gov't motion at 2). The Government offered a "call analysis" to refute the assumption that the calls were 40% narcotics related and 60% non-narcotics related and to demonstrate that all calls could reasonably have been intercepted and contended that only a very small percentage of the intercepted calls properly should have been cut off. Finally, the Government contended for the first time persons who had no innocent conversations intercepted lacked standing to demand suppression. Judge Waddy denied the Government's motion for reconsideration on all grounds. (App. [redacted] 25-27).

3. First Government Appeal – Scott I

After oral argument of the first interlocutory appeal the court of appeals delayed decision in *Scott I* until it decided similar minimization issues in its then-pending case of *United States v. James*, 161 U.S. App. D.C. 88, 494 F.2d 1007, cert. denied 419 U.S. 1020 (1974).

On June 27, 1974, after James was decided, the Court of Appeals released its *Scott I* opinion, affirming Judge Waddy on the standing issue. 504 F.2d 194, 197, but concluding, on the minimization issue, that Judge Waddy had not applied the *James*, standard. The Court

remanded *Scott I* to Judge Waddy for hearing under the newly promulgated *James* standard that minimization was satisfied if the agents made good faith efforts to minimize and if those efforts were reasonable.[10] 504 F.2d at 198; see *United States v. Tortorello*, 480 F.2d 764, 784 (2nd Cir.) cert. denied, 414 U.S. 866 (1973). The Court instructed Judge Waddy to accept evidence that would aid in assessing the reasonableness of the agents' conduct, including, if he was convinced of its validity the "call analysis."

4. The 1974 Remand Hearings

On remand, Judge Waddy held four days of hearings from October 15-18, 1974 ("the 1974 hearings"), concerning almost exclusively, the minimization issue. Cooper and Kellogg were the only two witnesses called. On November 12, 1974, Judge Waddy issued findings of fact, conclusions of law and an order (App. [redacted] 33), again suppressing all of the calls intercepted.

Judge Waddy found that while Cooper and the other agents knew that the statute and Judge Smith's orders required minimization, they made no attempt to comply, (App. [redacted] 37) and showed no regard for privacy and did nothing to prevent unnecessary intrusion. Ibid.

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[10]The Court directed that the District Court assess the reasonableness of the agents efforts in light of the purpose of the wiretap and the information available to them at the time of the interceptions. 504 F.2d at 198. The Court emphasized that "[t]he reasonableness of agents' attempts to minimize must be judged on a considerably more particularized basis . . ." than that utilized by the District Court. Ibid.

> "An examination of the totality of the conduct of the monitoring agents in this case during the duration of the authorized interception reveals a knowing and purposeful failure to comply with or even attempt to comply with the minimization requirements of the statute and the order of authorization. (App. [redacted])

At the hearing, Cooper had again testified that while he and the other agents knew that Judge Smith had ordered them to minimize, they took no steps to do so.[11] The instructions under which the agents operated were to intercept and record every call, except for certain classes of privileged communications. (lawyer-client, doctor-patient and priest-penitent[12]). Since no

[11]1974 Tr. 97-98, 324-35. After Kellogg's testimony, Judge Waddy recalled Agent Cooper to answer one question. BY THE COURT: The question I wish to ask you is this, whether at any time during the course of the wiretap – of the intercept, what if any steps were taken by you or any agent under you to minimize the listening? ANSWER: Well, as I believe I mentioned before, I would have to say that the only effective steps taken by us to curtail the interception of conversations was in that instance where the line was connected to – misconnected from the correct line and connected to an improper line. We discontinued at that time. QUESTION: Do I understand from you then that the only time that you considered minimization was when you found that you had been connected with a wrong number? ANSWER: This is correct, Your Honor.

[12]1974 Tr. 90-97, 190. QUESTION: So what I am saying is that regardless of the nature of the call, except those three privileged categories, all calls were to be recorded whether narcotics – related, or otherwise, preserved and then passed on to review by Mr. Sullivan, is that correct, sir? ANSWER: Basically that is correct, sir. Tr. 95.

privileged communications were encountered, Agent Cooper admitted intercepting all 384 calls made or received during the period of the tap. Tr. 79, 94-97.

Judge Waddy found that the conclusion that 60% of the intercepted calls were not narcotics related stemmed from the classifications of the monitoring agents,[13] who reported to Judge Smith but did not inform him there was no attempt to minimize. (App. [redacted]).

Following the court of appeals' direction, Judge Waddy admitted the call analysis into evidence. He found that Kellogg made the call analysis as an advocate, that it was not shown to contain realistic categories for agents to use in manning a wiretap, (App. [redacted]) and in fact conflicted with the reports and characteristics of the agents. (App. [redacted]) He then concluded that the call analysis was after the fact and did not show that the agents complied with the minimization order. (App. [redacted])

At the hearings, Kellogg admitted that the call analysis was purely after the fact, (1974 Tr. 423-424) without the aid of experts such as narcotics agents (1974 Tr. 354, 435-36) and was not meant to suggest that the agents had actually followed such guidelines, and that, in fact, a seven-value system such as his was impractical for use by field agents.[14] Examination

[13]This finding was based on Cooper's testimony to that affect. 1974 Tr. 308-309 (App. [redacted]).

[14]1974 Tr. 458-67, 471. KELLOGG: . . . The thrust of the call analysis is purely and simply an after-the-fact analysis, designed to provide the Court with a means of factually analyzing the conduct of the agents. It was not in an effort to infer, or assert, that the agents followed these relatively sophisticated delineations in the course of the intercept. They did no[t], insofar as I understand. 1974 Tr. 436.

indicated discrepancies betwe[illegible]e call analysis and the reports given to Judge Smith. 1974 Tr. 265-288.

Judge Waddy concluded that the failure to comply with the minimization order was unreasonable and that 18 U.S.C. §2518(10)(a)(iii) mandated suppression of all the calls intercepted. (App. [illegible])

> "The admitted knowing and purposeful failure by the monitoring agents to comply with the minimization order was unreasonable. Such conduct would be unreasonable even if every intercepted call were narcotic-related. The validity of the search is not to be determined by what is found." Ibid.

5. The Second Government Appeal – Scott II

The Government's appeal from the second suppression order resulted in another reversal. (App. [illegible]) The Court's opinion, written by Judge MacKinnon, rejected Judge Waddy's primary concern with the perception and failures of the monitoring agents. (App. [illegible]) In substance, the Court uncritically adopted the call analysis, rejecting examination of agents' use of discretion as an impractical means of minimization during the course of a wiretap even though it conceded there was no effort to minimize. (App. [illegible])

> "To hold that the monitoring agents must make a determination whether to minimize in the course of each individual conversation would be an open invitation to criminals to escape detection by the simple device of devoting the initial part of each call to non-criminal matters. Thus the only feasible approach to minimization is the gradual development, during the execution of a particular wiretap

> order, of categories of calls which most likely will not produce information relevant to the investigation. Until such categories become reasonably apparent, however, interception of all calls will be justified under the wiretap authorization." (App. [illegible])

The Court conceded that no attempt at all was made to minimize, but rejected bad faith as a significant criterion, stating that:

> The subjective intent of the monitoring agents is not a sound basis for evaluating the legality of the seizure. For example, the agents could publicly declare their intent to disobey the minimization provisions of the wiretap order and yet it is possible that the ultimate interception will be found to have been reasonable." (App. [illegible])

The Court then uncritically adopted the Government's call analysis, and, comparing the *James* standards, concluded that the total interception was not unreasonable. (App. [illegible])

Although the Court found that the agents had acted reasonably, it went on to say that if a remedy had been necessary it would have merely called for suppression of the non-pertinent calls, and that the narcotics-related calls could remain in evidence. (App. [illegible], n.19)

A request for an *en banc* rehearing was denied with four judges dissenting. (App. [illegible]) This Court's denial of certiorari at the interlocutory stage was accompanied by Mr. Justice Brennan's dissenting opinion examining the minimization issue. (App. [illegible])

6. Trial

Scott, Thurmon and other defendants went to trial on July 15, 1976, and were found guilty of narcotics violations. The stipulation on which the guilt determination was based derived from the wiretap evidence.

SUMMARY OF ARGUMENTS

The minimization requirement of 18 U.S.C. §2518(5) is at the heart of the protections imposed in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, aimed both at protecting individual privacy and satisfying this Court's expressed distaste for general searches. The Court of Appeals erred by concluding minimization could be satisfied by an after the fact rationalization of how others might have read the wiretap transcripts. Rather, Congress' choice of the exclusionary rule to deter invasions of privacy requires analysis of whether monitoring agents acted in good faith and made an attempt at excluding non-pertinent conversations which was reasonable based on the facts they perceived. Here, the district judge found to the contrary; there was no good faith attempt to minimize and, instead, total interception, and, since the agents themselves categorized 60% of the intercepted calls as non crime-related, reasonable minimization efforts would require them to act on the basis of their own perceptions. Even accepting the after the fact "call analysis", it did not justify total interception when examined on the criteria used in the courts of appeals to test out good faith efforts to minimize.

Suppression of both crime related and non-crime related calls is the explicit statutory remedy for failure to minimize, a remedy particularly appropriate where, as here, the failure to minimize resulted, in effect, in a general search. For the same reason, the explicit statutory grant of standing to all victims of unlawfully executed wiretaps should not be rewritten by the court to cover only those whose innocent conversations were overheard. The suppression remedy protects both those victimized by an unlawful search producing tangible results and those searched without production of such results.

ARGUMENTS

I.

A REVIEWING COURT MAY NOT FIND COMPLIANCE WITH MINIMIZATION REQUIREMENTS BY ACCEPTING AN AFTER THE FACT ANALYSIS AIMED AT DEMONSTRATING THAT NARCOTICS AGENTS COULD HAVE CONSIDERED MOST CALLS CRIME RELATED, WHEN THE MONITORING AGENTS ACTUALLY CONSIDERED MOST CALLS TO BE NON-CRIME RELATED AND NEVERTHELESS MADE NO EFFORT TO MINIMIZE INTERCEPTION OF THOSE CALLS.

A. The Error In The Court Of Appeals' Analysis

The Scott II court saw "objective reasonableness" after-the-fact as the decisive factor in testing agents' compliance with minimization requirements; whether

the agents subjectively intended to minimize their interceptions, the bad faith of the monitoring agents in not instituting any minimization procedures and the agents' assessment of which calls were crime related were thus deemed essentially irrelevant.

The explicit terms of Section 2518(5) mandate that monitoring agents take affirmative steps to minimize intrusions in executing valid wiretap interceptions. Section 2518(5), in turn, was made a part of the 1968 act because of congressional concern that authorized electronic surveillance not be conducted in a manner that violates the constitutional guidelines announced in *Berger v. New York*, 388 U.S. 41 (1967), and *Katz v. United States*, 389 U.S. 347 (1967). S. Rep. No. 1097, 90th Cong. 2d sess., 102 (1968); [1968] U.S. Code, Cong., & Ad. News, pp. 2112, 2153, 2163.

In *Berger*, this Court condemned New York's wiretap statute because it gave wiretapping police a "roving commission to seize any and all conversations." 388 U.S. at 59. The distaste for the wiretap's "general search" expressed in the majority opinion and its recognition of the unique pervasiveness of an eavesdrop search, led at least one member of the Court to suggest that the Court had, by indirection, made constitutional wiretaps impossible. 388 U.S. at 113 (Mr. Justice White dissenting). Mr. Justice Stewart's opinion in *Katz* settled some of those fears, but it, too, emphasized the need for careful procedures to prevent overreaching wiretap searches, pointing to the close supervision in *Osborne v. United States*, 385 U.S. 323 (1966). It was to the Court's expressed distaste for general searches by wiretap that the Congress responded with §2518(5), in an effort to avoid unwarranted police invasions of

privacy by forcing wiretapping police themselves to take steps to protect privacy. *United States v. Focarile*, 340 F. Supp. 1033, (D. Md.), aff'd *sub nom United States v. Giordano*, 469 F.2d 522 (4th Cir. 1972), aff'd 416 U.S. 505 (1974). The legislative history of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 demonstrates its goal of preventing unwarranted invasions of privacy by regulating police conduct,[15] by establishing companion safe guards that law enforcement officials must follow in executing a lawful wiretap. E.g., §§2518(3)(a), (b), (c) and (d). These provisions were designed to assure that

> the order will link up [a] specific persons, specific offense, and specific place. Together [the provisions of Title III] are intended to meet the test of the Constitution that electronic surveillance techniques be used only under the most precise and discriminate circumstances, which fully comply with the requirement of particularity.

S. Rep. No. 1097, 90th Cong., 2d sess., 102 (1968); see *Bynum v. United States*, 423 U.S. 952, 952 (1975) (Mr. Justice Brennan dissenting from denial of certiorari).

Although Congress focussed, especially in the minimization requirement, on the conduct of monitoring

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[15]Title III pronounces dual purposes: (1) protecting the privacy of wire–communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire . . . communications may be authorized." S. Rep. No. 1097, 90th Cong., 2d sess., 66 (1968); see Note, Minimization of Wire Interception: Pre-Search Guidelines and Post-Search Remedies, 26 Stan. L. Rev. 1411, 1413-14 and n.17 (1974).

agents, the court of appeals in this case ignored that focus for after the fact analysis of the contents of the wiretap transcripts. Congressional belief that minimization should be tested during the course of the wiretap, however, and not validated by the ultimate results is evident in its recognition that the judiciary must supervise the interception of wire communications in order that the privacy of innocent persons is protected. See 18 U.S.C. §2518(6) (1970); [1968] U.S. Code, Cong. and Ad. News, pp. 2112, 2177, 2192-93. This continuing check on the progress and continued need for the surveillance emphasizes the paramount Congressional concern that Title III wiretaps be administered in good faith so as to stay within the constitutional standards promulgated by this Court in *Berger* and *Katz*.

Congress consciously chose the exclusionary rule in section 2515 to enforce the limitations Congress imposed on wiretapping. *Gelbard v. United States*, 408 U.S. 41, 48-49 (1972).[16] This Court has repeatedly said that the "prime purpose of the [exclusionary] rule, if not the sole one, is to deter future unlawful police conduct." *United States v. Calandra*, 414 U.S. 338, 347 (1974). See also *Stone v. Powell*, 428 U.S. 465, 485-86 and n.23 (1976); *United States v. Janis*, 428 U.S. 433, 446 (1976); *United States v. Peltier*, 422 U.S. 531, 536-49 (1975), *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 413 (Chief Justice Burger, dissenting); See *Berger v. New York*, 388 U.S. 41, 50-51 (1967).

Any rule primarily concerned with police deterrence must make its results turn on the intention of the

[16]S. Rep. No. 1097, 90th Cong., 2d sess., 96 (1968).

police at the time they acted and the reasonableness of their perceptions and actions in light of the facts known to them; the model rewards reasonable good faith efforts and punishes those which are in bad faith or are unreasonable. See, e.g., *Michigan v. Tucker*, 417 U.S. 433, 446-447 (1974); *United States v. Peltier*, 422 U.S. at 537-38, 542 (1975). This need to examine the conduct of the police in light of their intention and the facts known to them applies with equal force under Title III. Under Fourth Amendment deterrent rationale and Title III, after-the-fact analysis of the results of police conduct is irrelevant if the officers failed in bad faith in execution of their responsibilities[17] or acted unreasonably.

Circuit Judge Robinson, in explaining his vote to review Scott II *en banc*, noted that "[I]f objective reasonableness is the standard [for evaluation of minimization compliance] there is grave danger that determinations of reasonableness will be dictated by hindsight evaluations of evidence uncovered by wiretaps. This, in turn, is bound to generate a strong temptation to wiretap first and then use the fruits of the interception in an effort to demonstrate that the intrusion was justified." (App. [redacted]) All of the circuits passing on the question have likewise concluded that, in minimization cases, results turned on the good faith or bad faith of monitoring agents at the time of the wiretap and the reasonableness of their conduct in light of the facts known to them; courts have refused to

[17]Of course, an illegal search or seizure may not be validated by what is found. See *United States v. Johnson*, 333 U.S. 10 (1948); *United States v. DiRe*, 332 U.S. 581 (1948).

suppress for failure to minimize even in total interceptions and despite being shown categories of non crime-related conversations which, in hindsight might have been cut-off.[18] The same analysis, of course, mandates suppression where, as here, there was both bad faith failure to attempt minimization and a perception that a substantial majority of the intercepted conversations were non crime-related.[19]

Judge Waddy specifically found that the "call analysis" did not reflect the understanding of the monitoring agents at the time of interception and did not analyze the intercepted calls as they did. (App. [redacted]) His finding rested on questioning of Cooper, the

[18]In *United States v. Chavez*, 533 F.2d 491 (9th Cir. 1976), for example, the ninth circuit rejected the use of hindsight analysis to demonstrate particular calls that were not conspiracy-related. Id. at 494 (that is not the proper test). See *United States v. Armocida*, 515 F.2d 29, 45 (3rd Cir.) (not determinative that hindsight reveals a number of calls that could have been terminated at an earlier time where agents exercised their discretion in good faith) cert. denied 423 U.S. 858 (1975); *United States v. Vento*, 533 F.2d 838, 853 (3rd Cir. 1976), (minimization is not to be judged by a rigid hindsight, but must consider the problems confronting the officers at the time of the investigation); *United States v. Cox*, 462 F.2d 1293, 1301 (8th Cir. 1972) cert. denied 417 U.S. 918 (1974). (No failure to minimize even though in retrospect it is clear that a substantial portion of calls had no evidentiary value).

[19]Mr. Justice Brennan argued for an earlier grant of certiorari to review Scott II both because of the opinion's derogation of the importance of the monitoring agents' good faith attempt to comply and its retroactive validation of a Fourth Amendment search on the basis of what was uncovered by the search. 425 U.S. 917, 924 (1975).

agent in charge, who testified that the call analysis categories were not indicative of the agents' thinking and information, (1974 Tr. 332-334) and of Kellogg, the call analysis author, who testified that it was not "an effort to infer or assert that the agents followed these relatively sophisticated delineations in the course of the intercept." (1974 Tr. 436). In fact, they both testified that the call analysis disagreed with the characterizations of the agents, (1974 Tr. 143-44, 375) who, at the time of the intercepts, found 60 percent of the calls not narcotics related (1974 Tr. 308-11, 374-76) (App. [redacted]).[20]

When these findings are put together with Judge Waddy's findings that the monitoring agents "made no attempt to comply with the minimization order" and "did nothing to avoid unnecessary intrusion" (App. [redacted]),[21] it is apparent he had no choice but to find failure to minimize.

Judge Waddy's findings preclude use of the "call analysis" unless the Court completely rejects the mode of analysis of minimization discussed above.

The Scott II opinion's wholesale acceptance of this retrospective statistical analysis could not support its result for several other reasons. First, the district court found that the call analysis contained errors of

[20]Although the overall 40% - 60% breakdown of intercepted calls is reflected numerically in individual reports to Judge Smith (e.g., report of Jan. 20, 1970, App. 81, reporting number of calls and categorizing by number), he was never given an overall percentile breakdown.

[21]All of the findings are thoroughly supported by the record. See pp. [redacted], supra.

characterization and factual inaccuracies and did not represent information known to the agents at the time of interception.

Even if completely accepted, the call analysis does not place this wiretap on the acceptable side of the line when compared to the law in other circuits. The courts of appeals have proceeded on a case-by-case basis, evolving a general standard of reasonableness. See e.g., *United States v. Daly*, 535 F.2d 434, 441 (8th Cir. 1976); *United States v. Clerkley*, 556 F.2d 709, 716 (4th Cir. 1977); *United States v. Armocida*, 515 F.2d 29, 42 (3rd Cir.) cert. denied, 423 U.S. 858 (1975); *United States v. Cox*, 462 F.2d 1293, 1300; *United States v. Quintana*, 508 F.2d 867, 873-74 (7th Cir. 1975); *United States v. James*, supra, 494 F.2d 1007, 1018; see also [1968] U.S. Code Cong. Ad. News, pp. 2112, 2192. They are in substantial agreement that the statute is deemed to be satisfied if "on the whole the agents have shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion." *United States v. Tortorello*, 480 F.2d 764, 784 (2nd Cir.) cert. denied, 414 U.S. 866 (1973), quoted approvingly in *Clerkley*, supra, 556 F.2d at 716; *Armocida*, supra, 515 F.2d at 42; *James*, supra, 494 F.2d at 1018 and *Quintana*, supra, 508 F.2d at 873.

They have tested the reasonableness of agents' conduct against at least three principle factors: (1) the nature and scope of the criminal enterprise under investigation; (2) the Government's reasonable expectation as to the contents of, and parties to, the conversations; and (3) the degree of judicial supervision by the authorizing judge. *Clerkley*, supra, 556 F.2d

709, 716; *James*, supra, 494 F.2d 1007, 1019; *Quintana*, supra, 508 F.2d 867, 874-75. The location and operation of the tapped telephone is also relevant. *James*, supra, 494 F.2d 1007, 1020. Cf. *Bynum*, supra, 485 F.2d 390, 501 (since defendant knew of tap he had no expectation of privacy). All these factors apply to the actions and knowledge of the monitoring agents in relation to the particular conspiracy being investigated at the time of the actual wiretap surveillance.

In Scott I the court of appeals directed Judge Waddy to examine minimization in light of the foregoing factors. Even based solely on those pertinent factors, he found a violation. Although the court of appeals in Scott II reached a contrary conclusion, it had no right to overturn Judge Waddy's findings without concluding they were clearly erroneous. Rule 52, Fed. R. Civ. P.

1. Scope of the Criminal Enterprise Under Investigation.

Judge Waddy correctly found that the conspiracy under investigation was of lesser dimension than originally anticipated. (App. [redacted]). The Government originally believed and said in its wiretap application the wiretap would uncover a major interstate and international narcotics operation. (App. [redacted], see also App. [redacted]). These views changed when the intercepts revealed only local purchases within the Washington, D.C. area. (App. [redacted]).

2. Reasonable Expectations Regarding Conversations.

More extensive monitoring is permitted where guarded or coded language is used to change highly relevant conversations into seemingly innocent ones. Judge Waddy found that according to the reports and classifications of the monitoring agents their perception was that 60% of the intercepted calls were not narcotic related. (App. [redacted]). The only references to coded language in the monitoring agents' reports revealed an ability to understand such language, (Feb. 3, 1970 Report (noting that "female" is a code word for cocain); Feb. 8, 1970 Report (noting that a "thing which would take ten" is slang for dilution of narcotics)).

3. Location and Operation of the Subject Telephone.

Judge Waddy found that the telephones for which the interceptions were authorized by Judge Smith were located in residences, and were not the type of 'business' phone held less entitled to protection in *James*, supra. (App. [redacted])

4. Judicial Supervision by the Authorizing Judge.

Judge Waddy correctly found that the judicial supervision was inadequate to justify total interception because "Judge Smith was never informed that agents were making no attempt to minimize." (App. [redacted])

The legislative history of Title III directs that reports should be utilized specifically to show "progress toward

achievement of the authorized objective and need for continued interception." [1968] U.S. Code and Ad. News, pp. 2112, 2192-93. Thus the authorizing judge should be informed of all matters pertinent to the tap. Here, the reports failed to inform Judge Smith that no attempts to minimize were being made and that the conspiracy was of smaller dimensions than originally anticipated. As a result, he was denied the information necessary to check on whether the agents were minimizing. Judicial supervision, of course, suggests not only that the authorizing judge receive accurate reports, but also that he inquire into minimization efforts. In this case, the record reflects no such inquiry by the authorizing judge despite the reports' information that most of the intercepted calls were not crime-related.

II.

THE AGENTS' BAD FAITH FAILURE TO COMPLY WITH THE MINIMIZATION ORDER REQUIRES THE SUPPRESSION OF ALL INTERCEPTED CONVERSATIONS.

Judge Waddy recognized that the agents did not comply with Judge Smith's order to minimize and properly concluded after both suppression hearings that 18 U.S.C. §2518(10)(a)(iii) required suppression of all of the evidence obtained from the intercepts. (App. [redacted])

> "While the nature of the investigation may warrant closer listening than in some other type of case it does not warrant a total disregard of the statutory requirement and excuse the monitors from attempting to comply with the statutes and order of

> the court. Failure to comply with the statute and order of the court renders any evidence obtained by such failure suppressible. *Sabbath v. United States*, 391 U.S. 585." (App. [redacted])[37]

The Court of Appeals, in Scott II, finding the agents' minimization efforts reasonable, decided that it need not reach the remedy issue. But it made clear in a footnote that it disagreed with Judge Waddy and that "suppression should be limited to the evidence seized which was beyond the scope of the wiretap authorization." (App. [redacted][52], n.19)

18 U.S.C. §§2515 and 2518(10)(a) permit any aggrieved person to move for suppression of wiretap evidence on the grounds that:

> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval . . . is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

An aggrieved person includes anyone whose conversation was intercepted or against whom the tap was directed. 18 U.S.C. §2510(11). We noted earlier Congress' policy judgment in §2515 to make suppression the necessary remedy to protect an individual's privacy and to deter unlawful interceptions. Unlike the case in *United States v. Donovan*, 97 S.Ct. 658 (1977), the minimization requirement of §2518(5), for the reasons noted earlier in this brief, is at the core of the protections Congress imposed to protect privacy and to satisfy this Court's constitutional concern.

Because the agents failed to comply with the minimization order, §2518(10)(a)(i) and (iii) are clearly applicable. Judge Smith's wiretap order specifically stated that the wiretaps must be conducted in such a way as to minimize interception of calls not relating to the purpose of the wiretap. (App. [redacted][55], [redacted][57]) Yet Agent Cooper testified that, despite the fact that he and the other agents knew of the minimization requirement, (App. [redacted][732-733]), his instructions were to intercept and record all conversations, except "privileged" ones. (App. [redacted][769-773]) There was no attempt made to determine whether certain calls were not pertinent so that non-pertinent intercepts would be terminated. (App. [redacted][749]) Not only were Judge Smith's orders violated, but they were violated in bad faith. §2518(10)(a)(iii) requires suppression of all calls so intercepted even without the finding of no good faith efforts made here.

The Court of Appeals' suggestion that only non-pertinent calls should be suppressed derogates from the congressional goals discussed earlier and the Fourth Amendment exclusionary rule. Suppression of only non-pertinent calls could have little, if any, deterrent value. *United States v. Focarile*, supra, at 1046. The Government would have nothing to lose and everything to gain in condoning general searches of this nature. Ibid.

At the time of the 1971, hearings, Judge Waddy had little case precedent to assist him in deciding the present issue. Yet several courts have recognized the wisdom of his reasoning and called for total suppression where there has been a complete failure to minimize. *United States v. Scully*, 546 F.2d 255 (9th Cir. 1976); *United States v. Turner*, 528 F.2d 143 (9th Cir. 1975);

United States v. George, 465 F.2d 772 (6th Cir. 1972); *United States v. Focarile*, supra; *United States v. Leta*, 332 F. Supp. 1357 (D.C. Pa. 1971), rev'd on other grounds 467 F.2d 647 (3rd Cir. 1972).

Despite the obvious inadequacy of a partial suppression remedy, several courts have suggested only non-pertinent calls need be suppressed. *United States v. Cox*, 462 F.2d 1293 (8th Cir. 1972); cert. denied, 417 U.S. 918 (1974); *United States v. Sisca*, 361 F. Supp. 735 (S.D.N.Y. 1973), aff'd 503 F.2d 1337 (2nd Cir. 1974); *United States v. LaGorga*, 336 F. Supp. 190 (W.D. Pa. 1971); *United States v. King*, 335 F. Supp. 523 (S.D. Cal. 1971) rev'd on other grounds 478 F.2d 494 (9th Cir. 1973) cert. denied, 417 U.S. 920 (1974). The basis of these cases seems to be a fear of expanding the exclusionary rule, which Congress did not intend. See, e.g., *United States v. King*, supra. They conclude that only in cases such as *Berger* or *Katz*, where the interception is void ab initio, rather than in its execution, is total suppression necessary. Id.

Application of the literal terms of §§2515 and 2518(10), however, is also consistent with the traditional remedy applied in search cases. It has long been clear that unlawful execution of a search warrant voids the fruits of the search. See, e.g., *Sabbath v. United States*, 391 U.S. 585 (1968).

The closest analogy in the area of search and seizure of tangible objects is *Kremens v. United States*, 353 U.S. 346 (1957), which provides for total suppression where a search is so indiscriminate and sweeping as to be a general search. Basically, however, it is difficult to compare the search and seizure of tangible objects to intangible conversations. *Berger* recognized that the

latter case presents the greater potential for intrusion into the individual's privacy. Once seized, a conversation cannot be returned to the owner. *United States v. Focarile*, 340 F. Supp. at 1047. An interception is conducted over an extended period of time, and, in cases like this, does not discriminate. It is more likely to gather information of personal nature. The interception of a wire communication must necessarily be conducted without the interceptee's knowledge. This is not generally the case in a search and seizure of tangible objects. The greater danger of unnecessary intrusion requires a remedy that will insure its prevention. Total suppression must be that remedy.

The courts advocating the partial suppression remedy have failed to come to recognize the differences between the seizure of physical objects and an all-inclusive interception of conversations. Their reliance on cases like *United States v. Marron*, 275 U.S. 192 (19[redacted]) in which a prohibition agent authorized to seize liquor went beyond the scope of the warrant and unlawfully seized, in addition, a ledger, fails to recognize the difference. Where a wire interception is so unreasonably sweeping in scope as to become a proscribed general search, the search is void and the evidence must be suppressed. *Berger*, supra. See also Note, Minimization and the Fourth Amendment, 19 N.Y.L.J. 861 (1974); Note Minimization: In Search of Standards, 8 Suffolk U.L. Rev. 60 (1973). Those cases which distinguish between defects *ab initio* and defects in the execution are in error where, as here, the defect is so extensive as to make the interception a general search. When this occurs, the search is just as totally void and requires the same remedy of total suppression.

III.

BOTH SCOTT AND THURMON HAVE STANDING, AS AGGRIEVED PERSONS TO INSIST ON SUPPRESSION UNDER §2518(10)(a).

In its brief in opposition to the petition for a writ of certiorari, at p. 6, the Government argues that only Thurmon has standing to seek suppression of the wiretap evidence, because Scott was not overheard in a non crime-related conversation. The Government raised this argument in Scott I, and the Court of Appeals rejected it in the following language:

> "There appears to be no question that each of the appellees in this case is an "aggrieved person" within the meaning of the statute. As such, each is protected by the stringent safeguards of Title III, including the requirement that agents minimize interception of conversations that they are not authorized to intercept. Each aggrieved person is entitled to question whether the statutory minimization requirement has been satisfied and, on proving that it has not, to move to suppress a communication on the ground that "the interception was not made in conformity with the order of authorization or approval." (App. [redacted])

Section 2510(11), of course, defines an "aggrieved person" as a target of the interception or a party whose conversation was intercepted. As discussed above, Sections 2518(10)(a)(i) and (iii) mandate suppression sought by an aggrieved person when the communication was unlawfully intercepted or when interception did not conform with the authorization order.

The Government's proposed standing rule would twist the meaning of the relevant sections in a way not suggested in the legislative history. See *United States v. Bellosi*, 163 U.S. App. D.C. 273, 282 n.22, 501 F.2d 833, 842, n.22 (1974). See also *United States v. Giordano*, 469 F.2d 522 (4th Cir. 1972), aff'd, 416 U.S. 505 (1974). The only justification offered is the statement by this Court in *Alderman v. United States*, 394 U.S. 165, 175, n.9 (1969), that the legislative history of Title III evidences no intent to go beyond the traditional standing notions discussed in the *Alderman* opinion. Both Thurmon and Scott, however, meet those criteria, since their conversations were intercepted unlawfully. Moreover, as the Court of Appeals pointed out in *Bellosi*, Congress also sought to incorporate the standing concepts of *Jones v. United States*, 362 U.S. 257 (1960), excluding from suppression those claiming benefit from unlawful acts directed at somebody else. 163 U.S. App. D.C. at 282, n.22, 501 F.2d at 842 n.22.

Ultimately, the Government's standing argument must fail for the same reason the suppression remedy is mandated by the act; one is victimized by a wiretap executed in violation of §2518(5) whether innocent conversations are overheard or not. It is the manner of interception not what is intercepted which creates the violation of the statutes and requires the remedy. By analogy to the law involving search for tangible objects, Scott, accepting the Government's view, is like the victim of a search which bore no fruits. He is still

"aggrieved" because his privacy interest was invaded.[22] Because of the unique nature of wiretaps, however, the entire interception is available for suppression, as the statute plainly dictates.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed.

Respectfully submitted,

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[22] It is not at all clear that Scott was intercepted only in criminal conversations. Judge Waddy's decision rested solely on the Thurmon wiretap, finding the rest of the evidence, including the Lee wiretaps, to be derivative and, hence, unlawful. The Government's assertion of no innocent call by Scott, we assume, relates to the Thurmon wiretap, because the Lee wiretap transcripts are not in evidence. If the Court were to accept the Government's analysis of the standing issue now but accept petitioners' minimization argument, the appropriate remedy would be to remand to determine whether Scott was party to innocent calls on the Lee line Scott, of course, was not in a position to urge this analysis before, because, after the *Scott II* decision, he had no basis to claim illegality in the district court, and the court of appeals, in *Scott I*, had rejected the standing claim urged here.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached Brief of Petitioners was mailed on December 6, 1977 to:

Solicitor General
Department of Justice
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